

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Procedural Streamlining of	)	EB Docket No. 19-214
Administrative Hearings	)	
	)	

**COMMENTS OF  
NCTA – THE INTERNET & TELEVISION ASSOCIATION**

NCTA – The Internet & Television Association (“NCTA”)<sup>1</sup> submits these comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.<sup>2</sup>

**DISCUSSION**

NCTA appreciates the Commission’s efforts in this proceeding to streamline its administrative hearing processes and agrees that the Commission should take steps to reduce unnecessary delay and minimize burdens on parties and the Commission. At the same time, to best promote efficiency in Commission hearings, the Commission must also ensure that any changes to its procedures will continue to fully protect all parties’ due process rights and will not result in the filing of excessive or frivolous complaints.

***Use of Written Hearings.*** The Commission proposes that (i) it may in a designation order require the presiding officer to conduct a hearing on a written record, rather than conduct a live

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<sup>1</sup> NCTA is the principal trade association of the cable television industry in the United States, which is a leading provider of residential broadband service to U.S. households. Its members include owners and operators of cable television systems serving nearly 80% of the nation’s cable television customers, as well as more than 200 cable program networks. Cable service providers have invested more than \$290 billion over the last two decades to deploy and continually upgrade networks and other infrastructure—including building some of the nation’s largest Wi-Fi networks.

<sup>2</sup> *Procedural Streamlining of Administrative Hearings*, Notice of Proposed Rulemaking, EB Docket No. 19-214, FCC No.19-86 (rel. Sept. 6, 2019) (“*NPRM*”).

hearing; and (ii) a presiding officer may conduct a hearing on a written record on her own initiative or on motion of a party.<sup>3</sup> NCTA generally supports the use of written hearings and agrees that written hearings could expedite the resolution of proceedings. However, there may be instances in which a live hearing is more appropriate given the subject matter or circumstances of a particular proceeding, or the parties involved. Therefore, in proceedings in which the Commission or presiding officer has specified a written hearing, the Commission should allow parties to move—at an early stage of the proceeding—to convert the proceeding from a written to a live hearing upon a showing that doing so would serve the interests of justice. The presiding officer could then decide the issue after considering briefing from the opposing party.<sup>4</sup>

***Selection of a Presiding Officer.*** Although the Commission’s existing rules allow for certain hearings to be conducted by the Commission or by one or more Commissioners,<sup>5</sup> hearings should continue to be conducted by an administrative law judge (“ALJ”), regardless of the proceeding’s subject matter. ALJs are non-political officials who have expertise in the administrative hearing process and experience in conducting such hearings. Moreover, in contrast to Commissioners who are necessarily focused on a host of other agency matters and priorities, ALJs may focus solely on such hearings and the issues presented.

***Selection of a Case Manager.*** The Commission seeks comment on directing designated Commission staff to perform case management functions when the Commission itself serves as

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<sup>3</sup> NPRM ¶ 7.

<sup>4</sup> Similarly, if a party moves to convert a proceeding from a live hearing to a written hearing, it should be required to show that doing so is in the interests of justice, and the presiding officer should consider briefing from the opposing party before reaching a decision.

<sup>5</sup> See 47 C.F.R. § 1.241.

the presiding officer in a hearing.<sup>6</sup> As discussed above, NCTA supports an ALJ serving as the presiding officer in all hearing proceedings. However, should the Commission decide to conduct certain hearings itself, it should ensure that staff perform only those case management functions that would be performed by a court clerk, such as scheduling and document management. Matters that have the potential to be decisional to the outcome of a hearing—e.g., ruling on discovery motions or other interlocutory matters, or holding conferences to settle or simplify the issues—are not appropriate for a case manager and should be handled by the presiding officer.

***Evidentiary Rules.*** As the Commission notes, the Federal Rules of Evidence are at present only loosely followed in many Commission hearings.<sup>7</sup> NCTA agrees that “[t]his lack of clarity as to the relevant evidentiary standard has the potential to cause confusion for parties and to lead to evidentiary disputes[.]”<sup>8</sup> The solution is not, however, to make the evidentiary standard in the Commission’s rules *even more* permissive, as this would likely *increase* confusion and the risk of disputes. Rather, the Commission should retain its current evidentiary rule and reaffirm that the Federal Rules of Evidence provide the appropriate framework. The Federal Rules of Evidence are widely adopted—applying in civil and criminal proceedings in U.S. federal courts as well as serving as the basis for the evidentiary rules used in many state courts—and will therefore be familiar to many parties, reducing the potential for confusion. Continued use of the Federal Rules of Evidence, even if relaxed on occasion “if the ends of justice will be better served,”<sup>9</sup> will also help ensure that there is consistency in how hearings are conducted and that all parties are treated fairly.

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<sup>6</sup> See *NPRM* ¶ 13.

<sup>7</sup> See *id.* ¶ 20.

<sup>8</sup> *Id.*

<sup>9</sup> 47 CFR § 1.351.

## **CONCLUSION**

NCTA appreciates the opportunity to comment on the Commission's hearing procedures. To streamline its procedures and fully protect parties' due process rights, the Commission should (i) expand the use of written hearings but continue to use live hearings when doing so would serve the interests of justice; (ii) continue to rely on ALJs as presiding officers in all hearings; (iii) ensure that any staff member that the FCC designates as a case manager performs only those functions that would be performed by a court clerk; and (iv) retain its current evidentiary rule and reaffirm that the Federal Rules of Evidence provide the appropriate framework for the introduction of evidence in Commission hearings.

Respectfully submitted,

**/s/ Rick Chessen**

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November 6, 2019